8395

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In the United States Circuit Court of Appeals

For the Ninth Circuit.

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In the Matter of the Application of
GAVIN W. CRAIG
For a Writ of Habeas Corpus.

GAVIN W. CRAIG,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANT.

JOHN P. BEALE,
E. T. McGANN,
GAVIN MORSE CRAIG,
Broadway Arcade Bldg., 542 S. Bdwy., Los Angeles,
Attorneys for Appellant.

GAVIN W. CRAIG,
In Propria Personam.

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INDEX.

TABLE OF AUTHORITIES CITED.

TEXT BOOKS.

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An Answer to the Question Propounded by Judge Haney at the Oral Argument Before This Court Whether the Denial of Both Special and General Demurrers to the Indictment by the Trial Court and Its Affirmance on Appeal Did Not Determine the Issues Therein Involved.

It has been repeatedly held by Federal Courts as well as by courts of the various states that the general doctrine of *res judicata* is not applicable where a judgment is attacked upon the ground that the court rendering it lacked jurisdiction and that it was therefore void. That this is so finds proof in dozens of federal cases which have, upon application for habeas corpus, considered and de-

termined such issues adversely to their previous and *final* determination in other courts. Of course, the general doctrine of *res judicata,* that an issue once determined by a final judgment is conclusive as between the same parties so long as it remains unreversed, applies equally to a judgment which has become final through failure to appeal as to a judgment which has become final through affirmance on appeal or for any other reason. Yet no federal court has refused to consider and determine the question of the *validity* of a final judgment rendered by another court, where that question has been properly presented to it, regardless of the fact that, if the principle of *res judicata* were applicable, it would have been argued that that question had been once and for all determined by the judgment of the court rendering it.

The following cases involve the overturning of such a final judgment and the determination anew of the issue of the court's jurisdiction to render it: *White v. Levine,* 40 Fed. (2d) 502; *Waugh v. Aderhold,* 52 Fed. (2d) 702; *Ballarini v. Aderhold,* 44 Fed. (2d) 352; *Bertsch v. Snook,* 36 Fed. (2d) 155; *Colson v. Aderhold,* 5 Fed. Supp. 111; *Mackay v. Miller,* 126 Fed. 161; *Aderhold v. Schiltz,* 76 Fed. (2d) 429; *Sprague v. Aderhold,* 45 Fed. (2d) 790; *State of Missouri v. Title etc. Co.,* 72 Fed. (2d) 595.

In addition to the above cases where the judgment had become final through failure to appeal, in the following cases the issue of the court's jurisdiction had been determined not only by the trial court itself but had also been adjudicated by a higher court to which an appeal had been perfected and which had affirmed the judgment. But still, the question of jurisdiction was conceded to be

a proper one to be again presented to another court upon a petition for habeas corpus and to be decided adversely to its former determination if it was found, through a new and independent examination of the record, that the trial court lacked jurisdiction. Such cases are *Ex parte Royall* 117, U. S. 241 at 253; *Moore v. Dempsey,* 261 U. S. 86; *Ex parte Bridges,* 2 Woods 428.

The above cited cases confirm, by inference at least, the rule expressly announced in other cases, to the effect that a judgment affirming a void judgment is itself void. These cases are discussed in Petitioner's Opening Brief at pages 15 *et seq.*

That the general principle of *res judicata* does not apply to the question of jurisdiction is again recognized in *Grubb v. Public Utilities,* 281 U. S. 469 at 475, where the court says:

> "The case in the state court was so far identical with the suit in the federal court as respects subject matter and parties that there can be no doubt that the judgment in the former, *unless invalidated by some jurisdictional infirmity,* operated to bar the further prosecution of the latter." (Italics ours.)

> "The doctrine of estoppel by judgment does not rest upon any superior authority of the court rendering the judgment * * * the adjudications which will operate as an estoppel may be rendered by a justice of the peace and other inferior courts." (34 C. J. 758.)

This being true, *res judicata,* if applicable at all to the issue of jurisdiction, would apply to judgments of state courts or federal district courts which have become final through failure to appeal as well as to judgments of the higher federal courts.

That petitioner's statement of the law, embodying a complete answer to this question and stated in his Opening Brief at page 9, is correct is conceded by the Government's Brief at page 3.

A second and distinct answer to Judge Haney's question is found in the fact that the principal grounds relied upon for the issuance of a writ of habeas corpus were not presented to either the trial court or the Circuit Court of Appeals by the special or general demurrers to the indictment. Nowhere in the demurrers, in the bill of exceptions, assignments of error, or in appellant's briefs was the proposition advanced that the indictment failed to confer jurisdiction upon the trial court because it lacked the essential ingredient of the office or the official capacities and functions of the persons to be influenced. It is well known that an appellate court considers only those arguments for reversal of a judgment which are specifically set forth in the assignment of errors and argued in the briefs. See:

Le Fanti v. United States, 259 Fed. 460;
May v. United States, 236 Fed. 495;
Kreuger v. United States, 254 Fed. 34;
Lee Tung v. United States, 7 Fed. (2d) 111, a 9th Circuit case.

Nor may it be said that the determination of the special or general demurrers became the "law of the case." In *Messinger v. Anderson,* 225 U. S. 436, 56 L. Ed. 1152, the court said:

> "Law of the case as applied to the effect of previous orders on the later action of the court rendering them *in the same case,* merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." (Italics ours.)

The Issues Presented In Petitioner's Opening Brief Relate Solely to the Question of Jurisdiction.

The first ground upon which we rely to secure the discharge of this petitioner is that the indictment sets forth no facts to charge one essential ingredient of the offense of conspiracy to obstruct or to endeavor to obstruct the due administration of justice; that consequently, this indictment is a nullity and could not and did not confer jurisdiction upon the trial court to try the case. We would emphasize that we rely upon the proposition that it is the settled law that the court had *no jurisdiction.* We believe that in our opening brief we have met this issue squarely. The authorities there quoted go to nothing less than that point. We have there shown that pleading an essential ingredient of an offense in generic words, with no facts whatever set forth, amounts to a failure to plead that ingredient; that where an essential ingredient is entirely omitted the indictment fails to charge any offense known to the law (pp. 28-32); that such an indictment is void, an utter "nullity," is "dead" (pp. 30-31), and leaves the court *"without jurisdiction* of the subject matter of the offense attempted to be charged." (p. 31.)

Neither in its brief nor in the argument before this Court has the Government even attempted to meet the authorities which we have cited which declare the law to be as above stated. Is it contended that even though a trial court had no jurisdiction over the subject matter of the offense attempted to be charged and hence no jurisdiction to pronounce judgment, the defendant cannot be discharged on habeas corpus? We are compelled to conclude that this is the Government's position. It has cited *In the Matter of Gregory,* 219 U. S. 210; *Knewel v. Egan,* 268 U. S. 442, and *Ex parte Ruef,* 150 Cal. 605.

It is expeditious to dispose of *Ex parte Ruef* by citing a few other California cases which establish beyond question that under the law of California where the information fails to state an essential ingredient of an offense attempted to be charged the petitioner will be discharged on habeas corpus. They are:

In the Matter of Roberts, 157 Cal. 472 (decided later than the *Ruef* case);

Ex parte Williams, 121 Cal. 328;

People v. Webber, 138 Cal. 149;

People v. Ammerman, 118 Cal. 23;

People v. Ward, 110 Cal. 369;

People v. Lee, 107 Cal. 477.

Analysis of In the Matter of Gregory.

From *In re Gregory, supra,* the reply brief quotes these excerpts: "the only question before us is whether the Police Court had jurisdiction"; "A habeas corpus proceeding cannot be made to perform the function of a writ of error"; and "we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constituted a crime, that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render the judgment." Our authorities do not conflict with these statements. The legal issues which we present were not involved in that case. There the information contained a statement of facts. It was stipulated to be a part of the information. The instant indictment contains *no averment of facts* concerning an essential element of the offense attempted to be charged,—

not one fact. *Keck v. United States,* 172 U. S. 434; *Hess v. United States,* 153 U. S. 587; and *United States v. Robinson,* 266 Fed. 240, all hold that where, as here, no facts are alleged, but only legal conclusions in the form of generic language, *there are no issues to present to a jury.*

Where, as in the Gregory indictment, facts are averred, the trial court has the undoubted right to "apply the law" and if it errs it is merely error and not want of jurisdiction. The court was "not concerned with whether the acts set forth in the agreed statement constituted a crime" because *acts* were set forth. And when the court said "we are not concerned with whether the information was sufficient" it of course had reference to the information before it which contained a statement of facts. It has no reference to an indictment which shows on its face that it does not state an offense known to the law and which violates two of the most prized constitutional rights of the accused.

Again, the Gregory opinion quotes with approval *Ex parte Parks,* 93 U. S. 18, to the effect that the trial court must pass on the question whether or not the "act" charged is a crime, and that it has jurisdiction to do this. But in the instant indictment no "act" respecting an essential ingredient of the attempted charge is set forth. We venture the assertion that no decision of the United States Supreme Court can be found which has said that the trial court had jurisdiction to pass on the question of whether the indictment stated an offense, where it wholly omitted an essential ingredient of the offense by pleading it in generic language only.

However, the *Gregory* case is authority that in a habeas corpus proceeding the indictment may be so deficient that the Appellate Court must say that it did not confer jurisdiction on the trial court. The court assumes that from the agreed statement of facts, stipulated to be a part of the information, it might appear that there was a total want of criminality and that in that case the trial court would be without jurisdiction to pass on other matters. Such is the case here.

It will be seen that there is a clear line of demarcation between the two lines of cases when both are carefully examined. Of the cases which seem to say that the trial court, if of competent jurisdiction, has power to pass finally upon its own jurisdiction, if it has general jurisdiction of the class of cases involved, and in the exercise of that jurisdiction to decide whether an indictment states any offense known to the law, so that the correctness of its decision cannot be inquired into on habeas corpus, not one involved an indictment which alleged *no* facts upon an essential ingredient.

In each case, it appears from the opinion that "acts" or "facts" are alleged, upon which the trial court had jurisdiction to apply the law.

In each of the decisions where it was held that a petitioner on habeas corpus is entitled to his discharge where the indictment lacks an essential ingredient of the offense attempted to be charged, no mention is made of such essential ingredient, or it is set forth only in terms of generic language.

Analysis of Knewel v. Egan.

Let us now discuss the case principally relied upon by the Government in its argument before this Court, *Knewel v. Egan, supra.* There are several reasons why it does not apply to the issue herein raised that the instant indictment is void and that it conferred no jurisdiction upon the District Court, for any purpose.

Firstly, it is one which arose in a state court. The opinion itself makes it clear that the question concerning the sufficiency of the indictment is viewed from that standpoint and attention is called to the fact that each of the cases cited arose in the state courts; that in each the Supreme Court has stressed that in such cases, not because of lack of jurisdiction, but as a rule of practice, a Federal court should not by habeas corpus declare the judgments of the highest courts of states to be nullities, when such courts have held that the trial courts had jurisdiction. Space will not permit quoting from but two such decisions. They are *Baker v. Grice,* 169 U. S. 748, and *Howard v. Fleming,* 191 U. S. 126.

The *Baker* case was an appeal from an order of the United States Circuit Court discharging petitioner on habeas corpus after his conviction in the state courts of Texas. In reversing the Circuit Court the Supreme Court of the United States said that while the lower court had jurisdiction under the circumstances set forth (petitioner claimed that the state statute under which he had been convicted was unconstitutional) to issue the writ of habeas corpus, yet those courts ought not to exercise that jurisdiction unless in cases of peculiar urgency and that instead they will leave the prisoner to be dealt with by the courts of the state; that after a final determination

of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by a writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state, and finally discharged therefrom, and thus a trial in the state courts and by an indictment found under the laws of a state be finally prevented. After stating that cases justifying such interference are exceptional, the opinion continues:

> "Unless this case be of such an exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court."

In *Howard v. Fleming* the court says: "We premise that the trial was had in a state court and therefore our range of inquiry is not so broad as it would be if it had been in one of the courts of the United States." The court then holds that no Federal question was presented as concerned the indictment and that, as to the question of due process, the petitioner had failed to take the necessary steps to preserve that question.

Secondly, the *Knewel v. Egan* case is distinguishable from the instant case in that there the indictment, as in *In the Matter of Gregory,* set forth some facts upon which the trial court had authority to pass and to decide the question whether those facts described a public offense. It is elementary that an opinion is to be understood as intended to be limited in its scope by the issues upon which it is

passing. What is said about habeas corpus not being used to review the sufficiency of an indictment must refer to such an indictment as the one then presented to it.

That this is true is emphasized by the fact that in each of the decisions which it cites in support of its statement the opinion clearly indicates that the respective indictments considered set forth facts upon which the trial courts could apply the law, or in some instances where what was said was by way of analogy only (an indictment not being involved), that the kind of indictment it was discussing contained an allegation of facts.

We close our discussion on the *Knewel* case by quoting from one more case which it cites, *Markuson v. Boucher,* 175 U. S. 124, which says:

> "We have frequently pronounced against the review by habeas corpus of the judgments of the state courts in criminal cases, because some right under the Constitution of the United States was alleged to have been denied the convicted person, and have repeatedly decided that the proper remedy was by writ of error."

However, *in cases originating in the United States District Court* the rule has never been questioned to be as stated in petitioner's opening brief, page 36: "One who is deprived of his liberty under a judgment which denies him a constitutional right is entitled to be discharged by habeas corpus." The cases there stated and many others declare this to be the law. We are certain that none can be found holding counter to them and the Government has cited none.

Government's Brief Fails to Meet the Issues Presented by Petitioner.

The Government's brief comes very near to being a confession that the indictment under which petitioner has been convicted and incarcerated sets forth no facts to constitute a public offense, or, as *Hess v. U. S.*, 153 U. S. 587, puts it, that the indictment presents no issues which could be submitted to a jury. Nowhere in the Government's brief is any attempt made to assert that the indictment sets forth any *facts* to charge a conspiracy to obstruct justice. It contends that less is required in charging conspiracy to endeavor to obstruct justice than is required in charging conspiracy to endeavor to influence, etc., any officer, etc., in the discharge of his duties. When it is remembered that this argument is intended as an answer to the contention in petitioner's opening brief that the indictment fails to charge any offense whatever and directs its attack equally upon both charges, the unmistakable import of the Government's brief as it deals with this phase of the issue is to concede that the indictment, having entirely omitted an essential ingredient of the offense attempted to be charged, is a nullity.

Nor would a contention that less particularity is required in the charge of a conspiracy to endeavor to obstruct justice than in the charge of conspiracy to obstruct justice be of any avail. We believe the law to be that so far as charging conspiracy to endeavor to obstruct justice is concerned even greater particularity is demanded than in charging conspiracy to obstruct the due administration of justice. The rule and the reasons for it are well stated in *United States v. Ford,* 34 Fed. 26. The charge was that the defendant "did forcibly *attempt* to rescue" prop-

erty seized by a revenue collector. Although conceding that the evidence fully warranted conviction it was held that the motion in arrest should have been granted because the indictment failed to set forth facts as to the attempt. It is said:

> "An attempt to commit a crime is an incomplete effort made by some act intermediate to a criminal intention and a consummated crime. The intention of the actor can alone be clearly ascertained by the movements which he has made to complete his design. The acts and words of a wrong-doer are therefore essential ingredients to constitute an offense, and show the purpose he had in view."

Throughout the Government's brief from pages 8 to 16, inclusive, it is assumed that petitioner has contended that for the indictment to be valid it must name the officers whom it charges the accused conspired to influence. Our opening brief contains no such futile assertion. We believe the law to be as stated in *Kellerman v. United States,* 295 Fed. 796, that "the office or the official function" of the one whom the conspirators agreed to influence, "as a person within the class described in the statute, are facts which must be alleged in the indictment," without which it is fatally defective. We insist that the law is settled as stated in the authorities named in the opening brief (pp. 21-23), and especially as declared in *Milner v. United States,* 36 Fed. 890, that in charging the offense of *conspiracy to obstruct the due administration of justice* the person conspired to be influenced must be identified or particularized and his official function or official capacity is an essential ingredient of the offense, without which no offense can be charged.

The Government's brief suggests that the Court would take judicial notice of who the Attorney General and his assistants are. Apparently the purpose of the indictment is misconceived. We need not say that it is primarily to inform the defendant of the nature of the charge (the asserted facts constituting each essential element) and to protect him against double jeopardy.

But in arguing this issue the Government further assumes a fact which makes his argument misleading, to-wit, that the indictment in effect charged that the defendants conspired to influence "whatever Attorney General or assistant United States Attorney might be assigned to the particular case at any time." The language of the indictment does not warrant this construction. This language is set forth on page 18 of our opening brief. Nor does it warrant the construction attempted to be placed upon it that the charge was really that the conspirators agreed to influence "whatever person at any time during the life of the conspiracy had charge or control of the Italo case." If that had been intended by the pleader he might have and could have easily worded the charge so that it would say just that. The court's attention is again attracted to the *Milner v. United States* case, *supra,* where the charge was phrased in identically the same way as here; the accused were charged with having conspired to influence "*the* officers of the United States acting under the authority of the United States, for the Northern District of Alabama, and before whom said suits were pending," and it was held to be fatally defective

in not particularizing the official capacity or official function of the persons to be influenced or to identify such persons. Even if the language in the instant indictment were construed as suggested by the Government it would be just as deficient as though construed as it plainly reads, because under the *Milner, Kellerman* and other cases which we have cited, including the Cruickshank decision the official function or the official capacity of such person must be named. The authorities cited in our opening brief have never been overruled or qualified and they foreclose the strained argument which is presented in the Government's brief.

Apparent Conflict in Supreme Court Decisions Explained.

Before closing, petitioner desires to call this Court's attention to an apparent conflict in the decisions of the United States Supreme Court upon the issue of whether the sufficiency of an indictment to state any offense whatever may be properly raised upon a petition for a writ of habeas corpus.

Certain early cases commencing with *Ex parte Watkins,* 3 Peters 193, and including *Ex parte Parks,* 93 U. S. 18, and *Ex parte Yarborough,* 110 U. S. 651, held that its sufficiency in this respect could not be questioned on habeas corpus. The logic of the *Watkins* case seems sound for the opinion is founded upon the theory that the court could not do indirectly what it had no power to do directly. That this is the basis of the decision is shown by the following quotation:

> "This application is made to a court which has no jurisdiction in criminal cases, which could not revise this judgment; could not reverse or affirm it, were the record brought up directly by writ or error."

By in *Ex parte Coy,* 127 U. S. 731, the Supreme Court in no uncertain terms expressly overruled what it had declared in the *Watkins, Parks* and *Yarborough* cases. It says:

> "In the Watkins decision it certainly was not intended to say that because a Federal court tries a prisoner for an ordinary common law offense with no averment or proof of any offense against the United States or any connection with a statute of the United States, that he cannot be released by habeas corpus because the Court has assumed jurisdiction."

This disavowal of the almost unthinkable doctrine of the *Watkins* case is emphasized by the dissenting opinion of Justice Field. Of course, the reason expressly stated in the Watkins opinion for its decision is no longer present for the Supreme Court now may assume jurisdiction in criminal cases and reverse such judgments. Since the Coy opinion was written we venture to say that there is no decision of any Federal Court which has disputed that habeas corpus is a proper remedy where the indictment avers no facts whatever that constitute an offense against the United States; and further that no decision has denied that where such facts are pleaded in generic language only the indictment is void.

We submit that the instant indictment failed to charge any offense against the United States because an essential ingredient of the offense sought to be charged was omitted; that it was therefore void and failed to confer jurisdiction upon the trial court of the subject matter; and that lack of jurisdiction of the court rendering a judgment is a proper issue for presentation upon a petition for a writ of habeas corpus; also that the judgment of conviction was void because petitioner had been previously acquitted of the identical offense charged; and submit that the order and ruling of the court below should be by this Court reversed and the petition of appellant granted.

Respectfully submitted,

JOHN P. BEALE,
E. T. McGANN,
GAVIN MORSE CRAIG,
Attorneys for Appellant.

GAVIN W. CRAIG,
In Propria Personam.